A TRIAD OF POLITICAL CONCEPTIONS: STATE, SOVEREIGN, GOVERNMENT.

STATE, sovereign, government — these are words that meet the student of politics and jurisprudence at every turn. As scientific names it is highly important that they should have determinate meanings; but unfortunately they are employed by different authors, and sometimes even by the same author, in various senses. Amos mentions four discrepant connotations currently given to the term state.[1] According to Rousseau, state and sovereign denote respectively the passive and the active aspect of the body politic.[2] Bentham makes the sovereign parcel of the government. Austin uses state and sovereign interchangeably. In Holland's view, the sovereign is but one of the two parts into which the state is divisible. Some writers insist on the necessity of carefully discriminating government from state and sovereign.[3] Others take government as a synonym of state.[4] Indeed, examples of the confusion complained of might be multiplied indefinitely. No one, then, can deem it unprofitable to inquire what object of thought each of these capital and hard-worked terms most commodiously signifies, what the essential characters of the objects thus signified are, and precisely how these objects are related to one another.

In the following pages I shall try to contribute something by way of answer to these questions.

[1] The Science of Law, p. 118.

[2] See Rousseau, Contrat Social, l. i, ch. vi; Bentham, Principles of Morals, *etc.*, ch. xvi, § 17; Austin, Jurisprudence, vol. i, p. 249, n. (p); Holland, Jurisprudence (1st ed.), p. 38.

[3] Rousseau, Contrat Social, l. iii, ch. i; Pomeroy, Constitutional Law, § 37, p. 28; Burgess, Political Science and Comparative Constitutional Law, I. 68.

[4] Hearn, Legal Duties and Rights, ch. i, § 3.

I. *The State.*

I. An adequate analysis of the state in what may be called its outward or mechanical, as distinguished from its inward or organic, aspect requires us to notice at least the following topics, namely, its members, its territory, its political organization and its independence.

1. A state is a large aggregation of families, men, women and children.

The harmonization of vast population with constitutional freedom, which resulted from that wonderful Teutonic invention, representative government, was, of course, never dreamed of by Aristotle, the path-breaker in political science. Seeking to determine the ideal conditions of the Hellenic city-state, he says that a πόλις should have no more citizens than might be assembled in its market-place and taken in at a single view by the magistrate's eye.[1] He recognizes, however, that there is a minimum limit also to the number that can constitute a true state. Too small a group both would lack material for the varied coöperation necessary to the "good life" which the state should realize,[2] and would be fatally wanting in ability to resist the aggression of external foes.

In consonance with this, Hobbes mentions as the first essential of a commonwealth a "multitude sufficient to confide in for our security . . . not determined by any certain number, but by comparison with the enemy we fear": and it is "then sufficient when the odds of the enemy is not of so visible and conspicuous moment, to determine the event of war, as to move him to attempt." [3]

In criticising this passage, Austin remarks that if the capacity successfully to withstand every imaginable hostile combination be an indispensable attribute of an independent political

[1] Politics, bk. vii, chs. iv, v; Eth. Nic. IX, 10 3.

[2] ἡ πόλις . . . γενομένη μὲν τοῦ ζῆν ἕνεκεν, οὖσα δὲ τοῦ εὖ ζῆν. Politics, bk. vii. ch. iv.

[3] Leviathan, ch. xvii. To the same effect, Rousseau, Contrat Social, l. ii, ch. ix, *ad fin.* But *cf. Id.*, l. iii, ch. xv, *ad fin.* and note.

society, neither past nor present furnishes an example of one, since no community ever could possess might enough to stand against the world in arms.[1] The truth of this is obvious; but it may be freely conceded without any abandonment of the position that a certain power of numbers is inseparable from the conception of the state. A society which is so small numerically as to be practically defenseless, and which exercises autonomy purely by the sufferance of its neighbors or merely as a temporary consequence of their mutual fears and jealousies, is at best a kind of toy — a fragile political curiosity which only chance preserves against the spirit of conquest and "the general hatred of the small-state system."[2]

2. A second requisite of the state is a determinate territory, the home of the members.

It is scarcely necessary to recall how deeply Greeks and Latins blended their notions of civil society with the idea of the πόλις or *urbs*, whose area was the focus of their collective life, the abode of their great tutelary gods, the scene of their keenest pleasures, the only place where they could exercise and enjoy the full privileges of citizenship. In no other conception of polity does the element of definite locality loom so conspicuously as in this of the city-state. Among the Teutons, the architects *par excellence* of the nation-state, a clear recognition of community of country as a prime force in political coalescence was but tardily developed. For a considerable period after they had won for themselves seats within the bounds of the Roman empire

> they appear to have retained the traditions which they brought with them from the forest and the steppe, and to have still been in their own view a patriarchal society, a nomad horde, merely encamping for the time upon the soil which afforded them sustenance.[3]

Their sense of political unity was mainly personal in its source; it was derived in larger measure from their common

[1] Jurisprudence, vol. i, p. 241.

[2] Bluntschli, The Theory of the State (trans. 1892), pp. 239, 16; Sidgwick, Elements of Politics, pp. 209, 210.

[3] Maine, Ancient Law (3d Am. ed.), ch. iv, p. 100.

loyalty to the chieftain or king whom they obeyed than from the idea of the region they inhabited together. With the advent of the tenth century, however, feudalism appeared, and throughout nearly all western Europe the authority of rulers and the correlative obligations of subjects were, both in theory and in fact, founded upon the basis of graduated proprietary interests in certain territorial areas.[1] No doubt the prevalence of this system, at once a form of civil polity and a mode of tenure of land, contributed to establish a fixed geographical boundary among the chief ingredients of the conception of the state.[2]

The conjunction in thought between a political society and its territory has now become so close that, as Sidgwick points out,

> the two notions almost blend, and the same words are used indifferently to express either: thus we sometimes mean by "a state" the territory of a political community, and we sometimes mean by a "country" the political community inhabiting it. We speak of crossing the boundaries of a "state" and we say that a "country" has made up its mind.[3]

3. Although Aristotle asserts that in every state there must be a supreme power placed in the hands of one person, of a few or of many, and proceeds to discuss the question where it ought to be lodged;[4] nevertheless, it was reserved to the Frenchman, Bodin, writing in the latter half of the sixteenth century, first adequately to point out that the political organization of the state consists in the existence between its members of an all-comprehending relation of sovereign and subject.[5] From that time to the present, the leading conception of the science of politics has been drawn from the fact of

[1] "Land has become the sacramental tie of all public relations." Stubbs, Const. Hist., vol. i, p. 167.

[2] Maine, Ancient Law (3d Am. ed.), p. 102.

[3] Elements of Politics, pp. 213, 219, 220.

[4] Politics, bk. iii, chs. 7, 10, 11.

[5] Bodin's De la République was published in Paris in 1576, his Latin version of it ten years later. See Crane and Moses, Politics, pp. 41–43; Pollock, Hist. of the Science of Politics, pp. 46–53.

sovereignty — "a power," says Bodin, "supreme over citizens and subjects, itself not bound by the laws." Around this fact the thought of publicists and moralists has unweariedly circled, and out of the efforts to set forth its cause and furnish its ethical justification developed the once formidable dogma of the divine right of kings and the celebrated fiction of the social compact.

Every independent political society exhibits a determinate ruling part to whose will, when expressed by some sufficient sign, the bulk of the members of such society are habitually obedient. Such general obedience, whatever its other sources, is greatly due to the fact that the ruling part, through its agents, inflicts punishment upon those who set themselves against its commands — punishment that may extend not only to deprivation of property, but to corporal pain and even to death.

Supporters of the most antagonistic theories are able to agree in placing sovereignty at the foundation of the state.[1] Thus Hobbes asserts that men escape from anarchy into the protection of civil order by erecting "a visible power to keep them in awe."[2] "And this," says Locke, "puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth, which judge is the legislative or magistrates appointed by it."[3] So also Kant describes the state as a union of men under one will that determines by law what shall be recognized as belonging to each subject, and secures this to him by a competent power distinct from his own personality.[4] Similarly, Lasson defines the state as "a human community which possesses an organized highest authority as the supreme source of all compulsion."[5] And Bentham writes:

[1] Pollock, Hist. of the Science of Politics, p. 47.
[2] Leviathan, ch. xvii.
[3] Treatises on Govt., bk. ii, ch. vii, § 89.
[4] Philosophy of Law (Hastie's trans.), pp. 161–164.
[5] Rechtsphilosophie, p. 383.

When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society.[1]

We may, then, accept the doctrine that the political organization of the state is manifested in the permanent constitution of two organs that together include all its members, and that are characterized respectively by the functions of issuing commands and rendering obedience.[2]

4. Austin, in commenting upon the above-quoted passage from Bentham, observes that, considered as a definition of the state, it is defective in an important particular, namely, in omitting to mention the essential quality of independence.[3] The presence of this note or mark, which Bentham neglected, is what especially differentiates a state proper from a mere limb of a state, such as a canton, a colony or a province, and entitles a political society to hold a place within "the family of nations."[4]

A civil community lacks the quality of independence when the ruling organ therein enters into the ruling organ of another civil community that embraces the first; or, since the relation just described necessarily involves the habitual obedience of the ruling organ in the smaller community to a superior part of the compound ruling organ of the greater, we may say, as Austin does, that a political society is non-independent when

[1] Fragment on Government, ch. i, § 10.

[2] See Kant, Phil. of Law (Hastie's trans.), p. 169; Puchta, Outlines of Jurisprudence (Hastie's trans.), p. 79.

[3] Jurisprudence, vol. i, p. 240. The "independence" of the state is sometimes called its "external sovereignty," but inaccurately, because "sovereignty" imports the relation of superior and inferior, while normal states are under the "scepter of nature" only, and are theoretically equal. See Holland, Jurisprudence (1st ed.), p. 39; Maine, Ancient Law (3d Am. ed.), ch. iv, pp. 96–97; Clark, Practical Jurisprudence, p. 175.

[4] Holland, Jurisprudence (1st ed.), p. 39. According to its technical meaning in international law, this term includes only the Christian nations of Europe and their offshoots in America, with the addition of the Ottoman Empire. *Op. cit.*, p. 267.

the ruling organ therein is habitually obedient to a determinate political superior. Thus the British colony of Victoria is not a person known to international law, because it is not independent: and it is not independent, because its internal ruling power is a constituent parcel of that vast complex, the ruling power or sovereign of the entire British Empire; or (adopting Austin's criterion) because its internal ruling power is constantly limited in the exercise of its functions by the commands of the supreme part of the ruling power or sovereign of the whole British Empire, namely, the sovereign power of Great Britain.[1]

It is evident that the independence essential to the state is entirely consistent with the obedience yielded by civilized nations to the rules of international law; for these rules do not issue from a determinate political superior. They are laws of public opinion, not the commands of the sovereign power of a *magna civitas* or universal empire.[2] A political society whose ruling organ is ordinarily obliged by no other commands than those of public opinion has all the independence which a political society can possibly enjoy.

II. Having exhibited the state in its outward or mechanical aspect, as a numerous body of human beings permanently united by common inhabitation of a definite territory and by the establishment of an all-comprehending relation of sovereign and subject, and corporately possessing external independence, it now remains for us briefly to consider the state in its inward or organic aspect.

"Obedience," says Burke, "is what makes a government, and not the name by which it is called";[3] and to this we may assent if by "government" is meant simply an independent political society. To constitute a true state, however, something must be superadded. For this there is required an

[1] On this subject, see Dicey, Law of the Constitution (1st ed.), pp. 95–109.

[2] "The development of international law, or the institution of a universal state (*Weltreich*), might organize the legal responsibility of nations. At present, this is only an ideal, which the future may perhaps realize." Bluntschli, The Theory of the State (trans. 1892), p. 509.

[3] Speech on Conciliation with America.

obedience exacted with a regard to justice and the general happiness, and rendered in a corresponding spirit of spontaneous coöperation. The force of the sovereign must be directed according to right, and the observance of subjects transformed into duty.

As already shown, the institution of sovereignty is a condition absolutely essential to the appearance of the state. With its accomplishment civilization makes a prodigious stride: hordes crystallize into polities and anarchy gives place to regimen.[1] This is an achievement so vast that it seems to have well-nigh exhausted the political resources of the great bulk of the human race — the non-historical peoples of the world.[2] Some observers have been so impressed by its magnitude and significance that they have ignored the goal beyond. So Hobbes writes bare sovereignty as the last word in the philosophy of the commonwealth. For him, mere political organization is a consummate result. That his theory delivered men over to despotism, he deemed of no moment, since it sufficed to rescue them from the "perpetual war" of "every one against every one."

We by no means attain to the full conception of the state by uniting to its other elements above discussed, the ingredient of political organization. Still another constituent must be brought in — one whose rejection would compel us to deny that there is anything radically distinctive in the peculiar product of the political genius of the historical nations, to include Asiatic autocracies[3] and the barbarous monarchies of Africa under the category of the state, and to rank slaves as citizens. This final constituent is reached through a just apprehension of the purpose or end of the state, as contradistinguished from the independent political society.

[1] "It took thousands of years to accomplish it and exhausted the spiritual powers of all Asia in its accomplishment." Burgess, Political Science, *etc.*, vol. i, p. 60.

[2] As to "stationary and progressive societies," see Maine, Ancient Law (3d. Am. ed.), pp. 21, 23. For definition of an "historical" people, see Lavisse, Political Hist. of Europe (trans. by Gross), pp. 1, 2.

[3] "Asia has produced no real states." Burgess, *op. cit.*, vol. i, p. 60. See also Hearn, Legal Duties and Rights, p. 20.

Wherever sovereignty is chiefly a means of exploiting servient masses and is consequently for the most part founded upon supineness, habit and fear, there the state does not exist.[1] The state emerges when political organization becomes primarily an instrument for preserving the vital interests of its members, for securing their lives and liberties and fencing their great institutions of family, of property and of contract, and when, as a result, the bonds of civil cohesion upon which despotism must rely are supplemented by the nobler ties of patriotism, reason and active consent. Then the commands of the sovereign power assume a likeness to that ideal law which an ancient sophist figured as "an agreement and pledge between the citizens of their intending to do justice to each other,"[2] and which a modern philosopher describes as "the maintainer of the conditions to complete life in the associated state."[3] The purpose or end, then, apart from which we cannot adequately conceive of the state, is, in the words of Dante, "liberty, to wit, that men may live for their own sake"; or according to Lord Bacon's expression, "*ut cives feliciter degant.*"[4] "For citizens," continues Dante, "are not for the sake of the consuls, nor a nation for the king: but contrariwise, the consuls are for the sake of the citizens, the king for the sake of the nation."[5]

In the rise and development of the state we see, on the one hand, the domination of the governing part of political society growing into harmony with ethical requirements, and, on the other, the submission of the governed more and more acquiring the nature of voluntary coöperation for the general advantage; the relation of sovereign and subject is gradually transformed by the spirit of solidarity.

[1] Governments, says Aristotle, that have in view only the good of the rulers, "are tyranny over slaves; whereas a city is a community of freemen." Politics, bk. iii, ch. 6, *ad fin.* *Cf.* Locke, Treatise on Govt., bk. ii, §§ 90–94; Rousseau, Contrat Social, l. i. ch. 5.

[2] Lycophron, cited by Aristotle, Politics, bk. iii, ch. 9.

[3] Spencer, Political Institutions, p. 537, § 535.

[4] Obs. de Princ. Juris, § II.

[5] De Monarchia, cited by Pollock, Hist. of the Science of Politics, p. 37. See Bryce, The Holy Roman Empire, pp. 265–267.

With genuine insight, Schopenhauer interprets this metamorphosis, considered in an aspect purely subjective and psychological, as the work of reason, that mounts from the one-sided and personal to the catholic point of view, whence it discerns the fundamental unity of man and recognizes that, in the total of humanity, the pleasure of inflicting wrong is always defeated and swallowed up by the suffering which is the necessary correlative thereof. Through this knowledge come the renunciation of injustice and the substitution for individualistic egoism of a collective or corporate "egoism of all." [1] So far as morally defensible, the state is an embodiment of this rationally transfigured or universalized egoism and exists to make it effective ; and hence it may be said that in the idea, as opposed to the concept, of the state, there is presented the complete ascendency of the universal over the particular in man.[2]

II. *The Sovereign.*

In the course of the foregoing analysis it was asserted that the political organization of the state is manifested in the permanent constitution of two organs that together include all its members, and that are characterized respectively by the functions of issuing commands and rendering obedience. The first of these organs is the sovereign;[3] the second embodies the subjects. Austin[4] and Rousseau[5] have made us familiar with the truth that when the sovereign is of plural structure, *i.e.*, "an aristocracy in the generic meaning," some of the members

[1] The World as Will and Idea (trans. by Haldane and Kemp), bk. iv, § 62, pp. 442, 443, 445, 451, 457.

[2] "By an Idea," says Coleridge, "I mean that conception of a thing which is given by the knowledge of its ultimate aim." Church and State, p. 10.

[3] Sovereign is derived from the late Latin *superanus*. "*Sovran* appears to have come to our poets independently through the Italian *sovrano*." Clark, Practical Juris., p. 160, n. 11. "La Souveraineté, mot vague (né du latin du moyen-âge, de *superioritas*, *superanus*) et se prêtant facilement à des acceptions arbitraires. Cependant selon son véritable sens, le mot désigne un pouvoir qui décide dans son domaine en dernière instance, sans être soumis à cet égard à une autorité supérieure." Ahrens, Droit Naturel (8th ed.), t. ii, p. 362, § 110.

[4] Juris., vol. i, p. 244.

[5] Contrat Social., l. i, chap. vi.

of the state enter into the composition of both these organs, being "citoyens, comme participants à l'autorité souveraine, et sujets, comme soumis aux lois de l'état."

The sovereign into whose nature we are about to examine is the "political," not the so-called "legal" sovereign of the state. The legal sovereign is the formulator and announcer of the supreme commands that spring from the will of the political sovereign, and constitutes part of the government, as that will be hereafter defined. It is essentially a mandatory clothed with a measure of discretional authority, while the political sovereign is the master. In idea, the two are clearly separable; but in fact, they occur in more or less intimate coalescence. Thus, in Great Britain the legal sovereign is the queen, lords and House of Commons; and the political sovereign consists of the lords and the electors of the House of Commons.[1] At Athens, during its golden age of direct democracy, the legal and the political sovereign were virtually merged in a single assembly.[2] The *Grand Monarque* was not, indeed, as he declared himself to be, the state; but he was both legal and political sovereign of the state.

The political sovereign of the state is that determinate person or number of persons therein, who, either by direct personal assumption of governmental functions, or by participation in elections for members of the government, or by both, in an open, established and regular manner control the action of the government, and through it express and carry out, if need be by force, commands generally obeyed by the bulk of the community.

In order to raise the conception of the sovereign into greater distinctness and properly to accentuate the salient points of this necessarily cumbersome definition, I shall briefly consider (1) the criteria of sovereignty, (2) its location, (3) some current misconceptions, (4) its three classical forms, (5) the principle

[1] See Dicey, The Law of the Const. (1st ed.), p. 69; Austin, Juris, vol. i, p. 253.

[2] Fowler, The City-State, p, 162 ff.; Bluntschli, Theory of the State (trans. 1892), pp. 460, 461.

underlying them, (6) its unity, (7) its limitations and (8) its mode of exercise.

1. The above definition shows that the possession of secret, disorderly or spasmodic power in political affairs falls short of a participation in sovereignty. For example, Madame de Pompadour was able to persuade Louis XV, and by her intrigues could send ministers "tumbling one after the other like the figures of a magic lantern"; still no constitutionalist would assign her other than a mere subject's place in the French political system of her day. Between the time of Pertinax and that of Diocletian a licentious soldiery set up and cast down more than a score of Roman emperors; but the empire was not thereby changed from a monarchy to a military aristocracy. Wat Tyler and his Kentish followers did not share in sovereign power, though for a moment they overawed the king and dictated royal charters.

Since the procedure that determines the sovereign is but threefold, appearing sometimes in the immediate exercise of supreme governmental functions by the sovereign, as in absolute monarchy; sometimes in the immediate exercise of a share of governmental functions by one or some of the elements of a composite sovereign and the employment of the suffrage by the remainder, as in Great Britain; and sometimes in the employment of the suffrage alone, as in France and in the United States:[1] it is plain that a resort to mere organs of public opinion, such as petitions, mass-meetings, demonstrations like those of Chartists and Coxeyites, the lobby and the press, for the purpose of exerting sway over government, even though not transcending constitutional bounds, does not of itself suffice to place any one among the constituent elements of the sovereign. Aliens, minors and women all use these agencies, but are never merely for this cause counted as part of the political people of the state.

Political power in its widest sense has the *differentiæ* neces-

[1] In its highest grade government is partly hereditary and partly elective in Great Britain, while in France and the United States it is wholly elective. See Burgess, Political Science, *etc.*, vol. ii, pp. 18, 19, 22, 23, 35.

sary to specialize it into sovereignty only when it manifests itself in commands generally obeyed throughout the state, and has in overt and definitely ordered correspondence with it governmental officers for the formal expression and execution of such commands — officers who, in so far as distinct from the person or body wielding the power in question, are the creatures and removable agents of that person or body.

2. The question where sovereignty resides is thus always one of fact, to be determined by an analysis conducted under the guidance of the criteria just indicated. Its location differs in different states, and, even in the same state, frequently shifts widely with the advance of time. Thus in the England of William the Red, when the king's justiciar, Ranulf Flambard, "drove and commanded his gemots" over all the land, and exercised his "malignant genius" in devising the most burdensome exactions of feudal law, the sovereign power had one depository, *viz.*, the Norman kingship;[1] but it had quite another in the England of William IV and Victoria, of Lord John Russell and Mr. Disraeli and the reform bills of 1832 and 1867.

3. Although generally adhering to the maxim, "*Rectum et sui index et obliqui*," I pause here for a moment to mark certain prevalent errors about the location of sovereignty, because in this way I can conveniently raise into clearer relief some of the points that have been brought out above.

It is often said that sovereignty in states characterized by a high degree of constitutional freedom,[2] belongs to or resides in "the people." Thus Pomeroy asserts that, according to the American theory, "sovereign power should be conceived as indivisible in its nature, and as appertaining to the totality of the members of the body politic — to the entire people."[3] "In

[1] Montague, Elements of Eng. Const. Hist., p. 25; Goodnow, Comparative Adm. Law, vol. i, pp. 97, 98. See Burgess' views on the "three great revolutions in the political system of Great Britain," *op. cit.*, vol. i, pp. 92, *et seq.* Stubbs, Const. Hist. of Eng., vol. i, p. 338.

[2] *I.e.*, a system in which "the private members of the community exercise an effective control over the government." Sidgwick, Elements of Politics, p. 362.

[3] Const. Law, p. 5, pp. 28, 29.

America," writes Cooley, "the leading principle of constitutional liberty has from the first been, that the sovereignty reposed in the people."[1] The incorrectness of these views is demonstrable. For sovereignty, however widely democratized, never belongs to more than a minority of the members of the state. Women as a class only here and there share appreciably in it, and children are excluded from it; but women and children together make up the bulk of the population of every independent political community. Of course, it is easy to imagine a civil society entirely composed of adults of sound mind, who all participate in the direction of the government in the ways above specified. But nowhere outside of such a Utopia does sovereignty reside in "the people."

The error just noticed is palpable. More misleading and harder to expose is the false doctrine contained in the proposition that "the state as a person is sovereign and therefore we speak of the sovereignty of the state (*Staatssouveränität*)." This is the teaching of Bluntschli,[2] and also of those who say, as Hearn does, that positive law is "the command of the state or politically organized community."[3]

Reflection discloses that since the sovereign is a source of command and compulsion, sovereignty cannot actually appertain to the state regarded as an artificial person. Every true command is the expression of a desire touching the observance of a mode of conduct, backed by a purpose of punishing disobedience. But surely, supramundane existences aside, such desire and purpose can only arise in natural persons, that is, in real human beings. The personality of the state is merely "a sort of personality."[4] Strictly speaking, the state, as a distinct entity, has no psychology, and is incapable of entertain-

[1] Principles of Const. Law, p. 23. But see Cooley, Const. Lim., p. 29, where it is said that "as a practical fact, the sovereignty is vested in those persons who are permitted by the constitution of the state to exercise the elective franchise."

[2] The Theory of the State (trans. 1892), p. 500.

[3] Legal Duties and Rights, p. 17.

[4] According to Bluntschli, the state has not only personality but also gender; it is an "organized masculine personality" (*der Mann*). The Theory of the State (trans. 1892), pp. 23, 24, n. 2.

ing motives or of exercising volition. Much of what we read nowadays about the "organism of the state," about "group psychology" and "group will," approaches that mysticism in law and politics which Austin, with perhaps excessive acerbity, was wont to term "jargon" and "fustian." At best, these expressions are a perilous kind of figurative language. The so-called will of the state (*Staatswille*), command of the state and sovereignty of the state are at the bottom nothing else than the will, the command and the sovereignty of some member or members of the state.[1] Political science cannot be founded on metaphor. It must discard fictions and seek to reach the facts as in themselves they really are.

Still more extravagant in their aberrance is the class of writers who divorce sovereignty from every semblance of personality, urging with abundance of fervid rhetoric that the true sovereign is reason, justice, ideal law. "The voice of humanity," declares Guizot, "has proclaimed that the right of sovereignty vested in man, whether in one, in many or in all, is an iniquitous lie."[2] "Justice then is sovereign," says Royer-Collard, "because justice is the rule of right. The purpose of free constitutions is to dethrone force and to make justice reign."[3]

In the preceding chapter I took pains carefully to mark that the independent political community does not rise to the level of the state until its sovereign, withstanding the impulses to arbitrariness that result in despotism, acts largely in accordance with ethical requirements. This, however, does not satisfy theorists of the romantic school of Guizot. Animated by hatred of tyranny, and full of enthusiasm for the right, they rush into "the error of ideocracy."[4] Because the sovereign of the state habitually proceeds in conformity with the method of reason or justice or ideal law, they maintain that reason or justice or ideal law rules in the state. Thus they lose the

[1] See Taylor, The Right of the State to Be (Ann Arbor, 1891), pp. 28–36.
[2] Representative Govt. (Bohn's ed.), lect. vi, p. 59.
[3] Quoted by Bluntschli, *op. cit.*, p. 499, n. 3.
[4] *Ibid.*, p. 500.

operator in the *modus operandi*, and conjure up a sovereign without personality, devoid of will and of force,[1] a futile abstraction, disowned alike by sound political philosophy and by historical fact.[2]

4. Differences in the number of persons from whom the superior manifestations of sovereign power proceed give rise to the three classical forms of the sovereign. I say "superior manifestations"; for it must be noted that these forms do not depend solely upon whether the number exercising sovereignty be one, few or many: they depend also upon the grade of sovereignty so exercised. In a state, therefore, where government in its higher and wider action is directed exclusively by one or a few, the sovereign is monarchic or aristocratic, even though at the same time government in its petty and merely local or communal action is directed by the many.[3] Accordingly, when the sovereign power of directing the higher and wider action of government is resident in a single member of the state, the sovereign is monarchic; when it pertains to a number of members that

[1] Rousseau, with all his sentimentalism, did not dream of divesting the sovereign of force: "Quiconque refusera d'obéir à la volonté générale y sera contraint par tout le corps; ce qui ne signifie autre chose, sinon qu'on le forcera d'être libre." Contrat Social, l. i, ch. viii. On the other hand, Pascal's pessimism hindered him from recognizing the element of justice in the sovereignty of the state, and he attributed to it force alone: "Ne pouvant faire que ce qui est juste fût fort, on a fait que ce qui est fort fût juste." Pensées, Art. xv, § 17.

[2] In his work on Sovereignty, Bliss says: "That reason, that justice, in civil administration is our only sovereign, is more than a metaphor; the idea commands more than speculative approbation. As the suzeraine *could* command the homage, the obedience of his subjects, so reason, so justice *should* command the homage, the obedience of society." Later, he quotes with approval the following passage from James Wilson's lectures: "As to human laws the notion of a superior is a notion unnecessary, unfounded and dangerous — a notion inconsistent with the genuine system of human authority." It is political science of this sort that makes us turn to what Pollock calls "the stern limitations and the crabbed analysis" of Austin, not merely with patience, but with a lively feeling of gratitude. With perfect concinnity Professor Bliss has produced a treatise on "Sovereignty" for the purpose of showing that in what he calls the federal state, at least, sovereignty has no existence, and that the word should be expunged from the vocabulary of politics (ch. xii).

[3] Thus in Russia the form of the sovereign is monarchic, notwithstanding the fact that in the village communities, containing about five-sixths of the population, the heads of households exercise an inferior grade of sovereignty.

is small relatively to the whole adult population, the sovereign is aristocratic; when it pertains to a number of members that is considerable or large relatively to such population, the sovereign is democratic.

To illustrate: early in the third century Ulpian wrote the famous sentence, "Quod principi placuit, legis habet vigorem," and thus correctly pointed out the monarchic character of the then existing sovereign in the *Orbis Romanus*. At that time there remained only a trace of the political hypocrisy inculcated by the "maxims of Augustus." The forms of popular legislation had long since ceased to be observed. The senate, once an "assembly of kings," whose authority held the highest magistrates in subservience to its will, had sunk into a mere tool of the principate, and the emperor no longer hesitated openly to appear — what from the first he had been in almost all but seeming — the sole *dominus* of every agency of public rule. Again: whatever may have been the character of the sovereign power in England at an earlier period, during the fifteenth century it definitely assumed an aristocratic type, as the result of the severe restriction of electoral privileges which was then effected;[1] and this character it retained, despite the Tudor reaction toward absolutism, on the one hand, and the attempt under Cromwell's Instrument of Government and the efforts of Chatham, on the other, until the diffusion of the right of voting that followed the Parliamentary reforms of 1832 and 1867. Finally: democratic sovereignty is exemplified by the United States, Great Britain and the German Empire; for in each of these states the control over the culminating elements of their respective governmental systems is shared by a very large proportion of the mature male population. In the United States such persons possess proximately equal constitutional means of making themselves felt throughout the upper ranges of government; while in Great Britain, and much more in the German Empire, such persons possess unequal constitutional means of making themselves thus felt. In the Empire, for instance, there is a vast difference between the mere elector, who can only send

[1] Hannis Taylor, The Eng. Const., I, 527, 575; May, Const. Hist., II, 460, 461.

his "twenty-thousandth part of a talker to the national palaver" of the Diet, and the *Kaiser*, with his many voices in the Federal Council. Sovereignty, however, is democratic, not through the equipollence, but through the relative numerousness of those who join in wielding its superior grades of power.

5. At first glance there seems to be validity in the criticism that the principle underlying the three classical forms of the sovereign is merely arithmetical; that it is inexpressive of any significant fact or force, and hence is shallow and unfruitful. Schleiermacher has successfully vindicated the genuine scientific import of the classification.[1] Although these forms depend immediately upon differences in the number participating in the superior grades of power exercised by the sovereign, they are founded ultimately upon the degree of the extension of "political consciousness" among the members of the state. The phrase political consciousness, though of frequent occurrence, has not attained a fixed meaning. I employ it here to denote a rational apprehension of the rôle played by government in civil society, coupled with a permanent desire to bear a part in determining the modes and ends of its action. To possess political consciousness, then, is to have an understanding of what is and can be effected through the instrumentality of government, and a settled wish to share in its working. It is in consequence of the development of political consciousness in breadth and intensity that sovereignty has displayed a tendency to assume, after the monarchic, the aristocratic and then the democratic form.[2] I say "tendency," because this transformation has by no means gone on in steady correspondence with the increase of its cause, but has usually lagged behind — not seldom very far behind. Nevertheless, the constitutional history of the progressive nations discovers plainly enough the law that, sooner or later, political consciousness objectifies itself in appropriate civil institutions: no part of the population in which it is strongly developed ever fails, in the

[1] For a brief *résumé* of Schleiermacher's views, see Bluntschli, The Theory of the State (trans. 1892), 335–337.

[2] See Puchta, Outlines of Juris. (trans. by Hastie), 80, 82; Maine, Ancient Law (3d ed.), 11.

end, to grasp a material share of sovereignty in the state. The present condition of the woman suffrage movement shows that the greatest obstacle to the attainment of the full privileges of citizenship by women, is the feebleness of their political consciousness. What Bryce has said of them, with the United States especially in mind, is equally true as to all highly civilized countries: "The suffragists have some ground for the confidence of victory they express. If they can bring the public opinion of women themselves over to their side, they will succeed."[1]

6. That the sovereign is necessarily single, is a commonplace in discussions upon the theory of the state. Hobbes, for example, affirms that there is a "doctrine plainly and directly against the essence of the commonwealth; and it is this, that the sovereign power may be divided. For, what is it to divide the power of a commonwealth but to dissolve it; for powers divided mutually destroy each other."[2] Let us, then, consider briefly the nature of this unity, the grounds of its necessity and the conditions of its realization.

It is seen at once that this unity does not require that the sovereign should consist of a single person only. What it does require is that, when the sovereign includes a number, they should act in the performance of the function of the sovereign as if they were one; or, in a word, should constitute a functional whole. The requisite unity of the sovereign is revealed from the standpoint of its outcome. It must have the inherent capacity of originating a performable body of commands, instead of a *mélange* of "cross and cuffing"[3] injunctions. Obviously this capacity could not belong to two or more mutually unrelated centers of authority attempting to exercise full sovereignty throughout the same community. Again, there can be no real civil organization, no true relation of sovereign and subject, without general obedience on the part of the ruled.

[1] American Commonwealth, II, 448.

[2] Leviathan, ch. xxix.

[3] King James's address to Parliament in 1609. See *Westminster Review*, CXXI, 458.

But in a society exhibiting political superiors entirely independent in their operation, so that chance only would prevent their commands from falling into constant collision, general obedience would be inconceivable. "Nullus homo potest duobus dominis servire."

By implication, the conditions of the functional unity of the sovereign have already been pointed out. When the sovereign is an individual, the requisite oneness is an inevitable result of its uncompounded character. When the sovereign embraces a number, this oneness depends upon organization. Its elements are so coördinated, or so coördinated and subordinated, that their joint working creates for the subjects in the state a feasible scheme of legal duties — one that, translated into conduct, appears as a veritable civil order.

A most notable illustration of the kind of organization above described is furnished by the United States, where the possession of the political franchise indicates the constituents of the sovereign. Here millions of voters are associated in very numerous collegiate aggregates of widely varying degrees of compositeness, each of which aggregates has in correlation with it, and subject to its control, a determinate part of the machinery of government, both legislative and administrative. These aggregates, in spite of their vast multiplicity and their great differences in structure and in range and importance of power, are all made to coöperate in the accomplishment of the end for which the sovereign exists by means of an elaborate set of constitutional adjustments, according to which each aggregate, with its corresponding governmental apparatus, has an orbit of jurisdiction or functional competency separate from, and at the same time complementary to, that of every other aggregate. Thus, paramount grades of sovereignty are exercised by the highly compounded aggregate that controls the governmental apparatus whose action is required for the amendment of the federal constitution; lower grades are apportioned to the aggregates that respectively determine the federal government and the several commonwealth governments; and still inferior grades are allotted to those aggregates that direct the operation

of local government in counties, townships and municipalities. The unity of the sovereign effected by this organization is such that, disregarding minor flaws, there is established for each subject of the state a harmonious and practicable system of positive legal rules, *i.e.*, one that does not expose him to contradictory, and hence impracticable, demands. "The American citizen," says Macy, "lives under not less than five institutions called governments."[1] This is an under-statement, rather than an over-statement, of the truth. Nevertheless, the citizen's positive legal duties are as certain as are those of a subject of the Russian Czar. The devices employed to this end are like those of a "great factory wherein two [one might say six or seven] sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, and each doing its own work without touching or hampering the other."[2]

7. It has been erroneously asserted that the sovereign is omnipotent. The doctrine that the sovereign has the "power of compelling the other members of the community to do exactly as it pleases," and of putting "compulsion without limit on subjects or fellow-subjects," has been attributed to Austin by various authors.[3] Austin, however, did not accept it[4] any more than did his predecessors, Bodin[5] and Locke,[6] and, considering its palpable extravagance, one cannot easily see how it ever found place in the books.

In a thousand directions sovereignty is effectually abridged by the force of public opinion. Thus, it is limited by the operation of international law, which embodies public opinion in its most august and imposing, if not its most drastic, form.

[1] Our Government, p. 1.

[2] The American Commonwealth, vol. i, p. 318.

[3] See Maine, Early History of Insts. (N. Y., 1875), pp. 349, 350; Crane and Moses, Politics, p. 38.

[4] POLITICAL SCIENCE QUARTERLY, IX, 31 *et seq.*

[5] Bodin "tells us of organic laws or rules which may be so closely associated with this or that sovereignty that they cannot be abrogated by the sovereign power itself, and he instances the rule of succession to the French crown." Pollock, Hist. of the Science of Politics, p. 51.

[6] Locke, Treatises on Govt., bk. ii, ch. xi.

At a juncture when the cardinal unifying influences of the middle ages were fast failing, when feudalism as a political system was hopelessly discredited, when the Reformation had broken the sword of the Pope, and the sword of the Emperor had become a mere phantom, the labors of Ayala, Gentilis, Suarez and, preëminently, of Grotius formulated a body of rules bearing upon the mutual dealings of states which made swift conquest of the intelligence and conscience of Europe[1] and presently thereafter began to produce a sensible effect in the region of practice and history. Although it is true, as Lavisse declares, that "all these fine maxims, without a single exception, were flagrantly violated by the various governments, without a single exception,"[2] nevertheless it has come to pass that this seemingly flimsy code of public opinion, without a recognized organ of legislation, without an acknowledged tribunal, without definite sanctions, has succeeded in winning an authority which the most puissant of modern nations would not dare formally to repudiate. To-day, none of its established precepts is openly scorned, and many of them receive an obedience as constant as that accorded to the injunctions of positive law by the members of orderly commonwealths.

But, in addition to the constraint put upon it by international law, the power of the sovereign is always dependent also upon the subordination of the subjects, which is itself limited.[3] As Dicey well says:

> It would be an error to suppose that the most absolute ruler who ever existed could in reality make or change every law at his pleasure. . . . This is shown by the most notorious facts of history. None of the early Cæsars could, at their pleasure, have subverted the worship or fundamental institutions of the Roman world, and when Constantine carried through a religious revolution his success was due to the sympathy of a large part of his subjects. The Sultan could not abolish Mohammedanism. Louis XIV, at the height of

[1] Maine, Ancient Law (3d Am. ed.), p. 106; Bluntschli, Das Moderne Völkerrecht (Nördlingen, 1878), § 17.

[2] Polit. Hist. of Europe (trans. by Gross), p. 85.

[3] See Stephen, the Science of Ethics, p. 143.

his power, could revoke the Edict of Nantes, but he would have found it impossible to establish the supremacy of Protestantism, and for the same reason which prevented James II from establishing the supremacy of Roman Catholicism.[1]

According to the conception of sovereignty I am here presenting, the measure of truth to be found in the doctrine of the omnipotence of the sovereign is this: when the sovereign organ is a monarch, *stricto sensu*, or a body taken integrally, it cannot be bound by the obligation of positive law; and the same is true of the paramount portion of a sovereign organ composed of parts exercising different grades of authority. This is a mere corollary of the definition of positive law — a command of a *superior bearing the marks of sovereignty*. Obviously there can exist in the state no such superior over either of the three varieties of ruling power described above. Thus, the Sultan of Turkey cannot be trammeled by any bonds of positive law; neither could the Roman *nobilitas* as it appears in the later books of Livy and during what has been called the period of the "perfection of oligarchy" at Rome;[2] nor can the supreme portion of the vast composite sovereign power of the entire British Empire, *viz.*, the lords and the electors of the House of Commons. It is clear, however, that limitation by positive law is quite possible in the case of the subordinate portions of a composite sovereign organ, because for such subordinate portions there exists a superior characterized by the notes of sovereignty. Accordingly, we see that the part-sovereigns of the colony of Victoria and of the Dominion of Canada are restrained by positive laws which they cannot change, and which are changeable only by the culminating portion of the sovereign of the whole Brit-

[1] The Law of the Const. (1st ed.), pp. 70, 71, 72.

[2] At this time, not theoretically, but actually, the *nobilitas* was the sovereign power of Rome. See Fowler, The City-State, p. 220. The chief governmental instrument of this sovereign *nobilitas* was, of course, the senate. *Id.*, pp. 230 ff. The senate, in turn, controlled the magistrates, and the magistrates the assemblies. Tighe, Development of the Rom. Const., p. 127. See Freeman's Historical Essays, vol. iv, pp. 410 ff.

ish Empire regarded as a single state. Likewise the sovereign people of the several commonwealths of the United States are, as such, subject under positive law to that highest sovereign people to whom is committed the function of constitutional amendment.

8. It must be noted that in states having a sovereign of plural form the action of government is not controlled by the whole sovereign number, but only by parts, and that, therefore, in such states positive law is not the command of the entire sovereign, but merely of certain of its components. There is, however, more general concurrence than at first glance appears. I think that we shall not fairly be chargeable with super-refinement, if we maintain that all the members of a sovereign aggregate, by their voluntary coöperation in that capacity, do really assent to every positive law formulated and enforced by the government which that aggregate constitutionally determines. Knowing that disagreements are inevitable, every sensible person belonging to a sovereign body desires that less than all should have the power of effectual governmental control, the alternative being deadlock, or anarchy more or less pronounced.

To the extent here indicated, there is reality in Rousseau's contention that every true law is an expression of the *volonté générale*. On close examination Rousseau's "general will" proves to be but the will of a greater or smaller majority of the voters who compose the sovereign, rendered under such conditions of voluntary coöperation that it necessarily bears along with it the tacit, though real, assent of the apparently opposed minority. The majority desire the measure passed, *specifically;* the minority, *compendiously*, as wishing, first of all, in common with the whole body of citizens, the maintenance of the principle of majority rule. Where unanimity is wanting, the will of the strongest must prevail, or else the law must be committed to the weaker party and thus devoted to desuetude and death. In exercising the right of suffrage, says Rousseau, "each elector takes part in a proceeding for the discovery of the general will. When an opinion contrary to mine prevails,

that only shows that I was mistaken, and that what I thought to be the general will was not."[1]

Nor is Rousseau's view repugnant to the current and popular way of thinking. I deem myself not less a legislator than my neighbor, though his party, and not mine, has ruled the councils of the state for half a century. His opportunity is not my effacement. As Locke puts it, in a passage of which the matter leaves less to be desired than the manner:

> That which acts any community being only the consent of the individuals of it, and it being a body, must move one way; it is necessary the body should move that way whither the greatest force carries it, which is the consent of the majority, or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it agreed that it should; and so every one is bound by that consent to be concluded by that majority.[2]

Doubtless one cause of this acquiescence is acceptance of the doctrine that at bottom power and right are coincident. This belief, which the eloquence of Carlyle has most persuasively advocated on its historical side, has on its philosophical side received a vigorous support at the hands of the late Professor Lorimer in his *Institutes of Law*, and is by no means devoid of justification by the "world historical judgment"[3] and the "long result of time."

III. *The Government.*

There is no cause for surprise that the difference between the sovereign and the government has only in recent times been clearly apprehended. Early observers of the phenomena

[1] Contrat Social, l. iv, ch. 2.

[2] Treatises on Gov., bk. ii, ch. viii, § 96. The poverty of Locke's influence as a political writer, compared with the wide domination of Rousseau, is largely due to the painful lack of literary style in the former's work, and well illustrates Émile Deschamps's axiom: "La forme n'est rien, mais rien n'est sans la forme."

[3] "Die Weltgeschichte ist das Weltgericht"; said first by Schiller in a poem called "Resignation." See Bluntschli, The Theory of the State (trans. 1892), pp. 266, n. a.

of politics, confronted by the city-states of antiquity, saw the sovereign and the government in complete, or nearly complete, coalition. They wanted suitable objective aids to the making of this important discrimination. Likewise, the observers who wrote after the study of politics had revived from the sleep of the middle ages, found themselves almost everywhere, except in England, surrounded by absolute monarchies, and in these they beheld the *personnel* of the sovereign completely merged in that of the government. Here, too, were lacking "the proper external occasions for the excitation of thought." It was left for Bodin, and later Rousseau, firmly to grasp and clearly to set forth this neglected distinction. They have been followed in our country by Pomeroy[1] and Burgess.[2] It is the fashion nowadays to depreciate Rousseau; I think, however, that he has treated this subject justly and luminously, and therefore I substantially adopt what he says in the first chapter of the third book of the *Contrat Social.*

The public force, says Rousseau, requires an agent to concentrate it and set it to work according to the directions of the general will — to serve as a means of communication between the state and the sovereign, and to effect in the state something analogous to what the union of soul and body does in a man. This agent is the government, often unfortunately confounded with the sovereign, whose minister it is. It transmits to the people the sovereign's commands and sees to it that they are obeyed. The government is composed of simple officers of the sovereign, who exercise in its name the power of which it has made them the depositories, and which the sovereign can limit, modify and resume at pleasure. Nevertheless, the government has a real separate life, *un moi particulier*,[3] a certain discretional authority of its own, — the authority, we may say, of the expert,[4] — which serves to distinguish its members from mere official assistants, such as clerks, inspectors, revenue collectors, *etc.*,

[1] Constitutional Law, p. 28.

[2] Political Science, *etc.*, vol. i, pp. 69 *et seq.*

[3] Contrat Social, l. iii, ch. i.

[4] See as to this analogy of the "expert," Sidgwick, Elements of Politics, pp. 587, 588.

and the still humbler functionaries like lacqueys, porters and policemen.[1]

Passing by the ancient separation of governments into monarchies, aristocracies and democracies, as presenting nothing that need detain us, we come directly to the differentiation of government into legislative, executive and judicial branches, according to variations in the functions performed by its component elements. The importance of this division of labor to the existence of civil liberty was most powerfully urged by Montesquieu in his celebrated *Esprit des Lois*.[2] "Si la puissance de juger," he writes, "était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire." This view was afterwards adopted by Blackstone in his no less famous *Commentaries* and by Paley in his *Moral Philosophy*, and it found vigorous expression in the work of American constitution-makers.[3]

Montesquieu based his notion upon a study of the free constitution of England, but his observations were entirely erroneous.[4] Liberty does not depend upon "the separation of powers," because this separation does not exist either in England or elsewhere. Locke vaguely intimated the truth on this point,[5] and Madison expressly declared it in the *Federalist:*

> On the slightest view of the British constitution we must perceive that the legislative, executive and judicial departments are by no means totally separate and distinct from each other. . . . If we look into the constitution of the several states, we find that notwithstanding the emphatical, and in some instances the unqualified, terms in which the axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

The most that can be averred without impeachment is, that in

[1] Bluntschli, The Theory of the State (trans. 1892), pp. 527, 528.

[2] L. xi, ch. vi. See Crane and Moses, Politics, p. 195.

[3] See, for example, the Massachusetts Bill of Rights. As to the influence of the Esprit des Lois on American statesmen, see Bryce, American Commonwealth, I, 26.

[4] Goodnow, Comp. Adm. Law, vol. i, pp. 19–24.

[5] Treatises on Govt., bk. ii, chs. xii, xiv, §§ 148, 159.

the main executive powers are exercised by the executive, judicial powers by the tribunals and legislative powers by the legislature; and that this partial specialization of functions is useful, and has generally been adopted in the actual constitutions of modern states.[1]

For the sake of brevity, let us confine our attention to the exercise of the law-making function by the three divisions of government, drawing our illustrations from the United States, France and England. In the United States the chiefs of the eight great executive departments constantly promulgate rules for the direction of their subordinates — rules in whose origination Congress has no part except upon the theory that what a political superior permits, — what he might, but does not change, — he enjoins. The English cabinet, while commanding the full powers of the crown,[2] in which the older, classical commentators upon the British constitution placed the entire executive force of the nation,[3] at the same time formulates all government bills and controls the entire course of the legislative processes of Parliament. But the cabinet is made up entirely out of the *personnel* of the two houses, being, in Bagehot's view, "a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation." Again he calls it "a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state."[4] Every reader of Mr. Dicey's remarkable book on the *Law of the Constitution*, is acquainted with the vast extension of the *droit administratif* in France, which is distinctly a creation of executive functionaries.[5]

The part played in the making of law by English tribunals and those of English origin and mould, is less obtrusive, because their judges and lawyers, as if guiltily conscious of encroachment upon territory appropriated to another, constantly shroud their legislative operations in formulas of mere

[1] Sidgwick, Elements of Politics, p. 345.
[2] Burgess, Political Science, *etc.*, vol. ii, p. 213.
[3] Blackstone, Commentaries, vol. i, p. 249.
[4] The English Const. (N. Y. 1893), pp. 81, 82.
[5] The Law of the Const. (1st ed.), p. 196 ff. See also p. 187.

legal interpretation. Nowadays these tribunals do not, indeed, go so far as the English mediæval courts, which, in Taltarum's Case, for instance, ventured virtually to repeal a great statute of nearly two centuries' standing ;[1] or so far as the chancellors who created the equitable doctrines of trusts and mortgages in the teeth of the common law :[2] but, day by day, through "spurious interpretation" and clear innovation they still eat away old rules of law and keep supplying new ones.

The question has been raised, whether, in modern representative democracies, the law-making parts of government can fairly be regarded as "ministers" of the sovereign in the performance of their functions. In agreement with Rousseau, it was conceded that the legislature has a measure of discretional authority, "*un moi particulier*;" and the only doubt is, whether this authority is wide enough to confer what may justly be called independent power. Of course, we have nothing to do here with a discussion of how it ought to be, or how it is in ideal states. That is a matter of "deontology," as Bentham calls it — of *morale*, not of analytical or theoretical, as opposed to practical, politics. It is mainly from this rejected standpoint that the subject has been treated by Mill in his *Representative Government*, by Sidgwick in his recent *Elements of Politics* and by a host of other writers.

In order to confine our inquiry to the smallest possible space, let us consider this matter especially with reference to the two leading democracies of the world, England and the United States. It will be worth while to note some leading opinions upon the relation that actually exists, and continually tends to fuller existence, between the legislature and the sovereign power in these two countries.

According to Dicey,

> the essential property of representative government is to produce coincidence between the wishes of the sovereign and the wishes of the subjects. . . . This, which is true in its measure of all real rep-

[1] Statute De Donis Conditionalibus, 13 Ed. I, ch. i (1285). See Digby, Hist. of the Law of Real Prop. (2d ed.), pp. 220–223. This occurred in 1472. Monahan calls it "a piece of solemn juggling." Method of Law, p. 14.

[2] Digby, *op. cit.*, pp. 333 ff.; pp. 250 ff.

resentative government, applies with special truth to the English House of Commons.[1]

Burke called the House of Commons "the express image of the feelings of the nation."[2] Austin says:

> Speaking accurately, the members of the commons' house are merely trustees for the body by which they are elected and appointed; and, consequently, the sovereignty always resides in the king and the peers with the electoral body of the House of Commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*.[3]

Burgess maintains that "the suffrage-holders, when electing a House of Commons upon the issue of a new governmental policy, are in the British system the state [sovereign]," of which the cabinet is "the immediate representative."[4] "Towering over presidents and state governors," declares Bryce, "over congress and state legislatures, over conventions and the vast machinery of party, public opinion stands out in the United States as the great source of power, the master of servants who tremble before it."[5] "A steady opposition to a formed public opinion," says Bagehot, "is hardly possible in our House of Commons, so incessant is the national attention to politics, and so keen the fear in the mind of each member that he may lose his valued seat."[6]

If the passages above quoted are not so applicable to the relations subsisting between the sovereign and the legislature in the representative systems of France, Germany and Italy, this seems due to the fact that the electorates in these countries are masters merely less alert and less exacting,—to a sort of hebetude, a languid political consciousness, that springs from deficient practice and discipline in the art of local self-

[1] The Law of the Constitution, p. 78.

[2] Cited by Wilson, Congressional Govt., p. 227.

[3] Jurisprudence, vol. i, p. 253.

[4] Political Science, *etc.*, vol. ii, p. 215. See also Montague, Elements of English Const. Hist., pp. 214, 215.

[5] The American Commonwealth, vol. ii, p. 255.

[6] The English Constitution (N. Y., 1893), p. 309.

government, rather than to any essential defect in their powers of sovereignty.

Some writers lay too much stress upon the circumstance that representatives are generally uninstructed.[1] But they are not uninformed concerning the wishes of their constituents, or about the penalty attached to a disregard of these wishes. There has been no need of formal instructions to insure that Louisiana Congressmen should vote for a tariff on sugar, California Congressmen against generous treatment of the Chinese, or Southern statesmen for the repeal of the federal election laws. That the trust conferred is enforceable only by moral and political sanctions, is quite immaterial to the point at issue. Upon the sovereign agency employed to make this trust binding we have already dwelt. It has never been better indicated than in the protest of the Lords when the English Parliament, in 1716, prolonged its duration, without popular mandate, from three to seven years. Thereby their constituents, the protesting peers declared, were "deprived of the only remedy which they have against those who either do not understand, or through corruption do wilfully betray, the trust reposed in them, which remedy is to choose better men in their places."[2]

Coming now to a consideration of the sovereign's directive power over the law-making function of the courts, it must be granted that the latter enjoy a larger degree of immunity from interference than does the legislature. Still even here the hand of the sovereign is not so shortened as to lose its ability to control. In the United States the tenure of the law-making judges is indirectly, where not directly, elective, and there is generally manifested a growing tendency to increase the judges' sense of responsibility to the sovereign by shortening their terms of office, and making their appointments depend upon direct popular choice.[3] Moreover, along with the prodigious

[1] The principle of instructed representation finds expression in the German Federal Council (*Bundesrath*). This is disapproved by Prof. Burgess on the ground that "the *will* of a constituency has no place in the modern system of representative legislation." *Op. cit.*, vol. ii, p. 116.

[2] Thorold Rogers, Protests of the Lords, vol. i, p. 228.

[3] This policy, which was begun by Georgia, has been adopted by a majority of the states. Macy, Our Government, p. 104.

activity characteristic of modern legislatures proper, has naturally gone a restriction of the scope of the law-creating power of the courts. The judge is restrained from innovations by the knowledge that there is a restless and lynx-eyed legislature ready to pounce upon and nullify them. Even the judgments of the Supreme Court of the United States are subject to disallowance by the sovereign, as the Dred Scott Case was set aside by the Fourteenth Amendment. Furthermore, courts can be kept in subservience to the popular will through the action of the legislature in augmenting the number of their members, in depriving them of jurisdiction, or in abolishing them altogether; and the history of this country exemplifies all these extraordinary means of control. The result has been admirably summed up by Wilson in the following passage:

> Indeed it may be truthfully said that, taking our political history "by and large," the constitutional interpretations of the Supreme Court have changed, slowly but not the less surely, with the altered relation of power between the national parties. The Federalists were backed by a Federalist judiciary; the period of Democratic supremacy witnessed the triumph of Democratic principles in the courts; and Republican predominance has driven from the highest tribunal all but one representative of Democratic doctrines.[1]

If, now, we should turn our attention to the other modern free states, we should, I believe, be able to trace in them essentially the same dependency of the legislating parts of government upon the sovereign which has been marked in the cases of England and the United States.

To summarize the results of this long inquiry in the briefest possible formula, it may be said that, regarding our triad of conceptions from the standpoint of jurisprudence and in their relations to positive law, the state is the theater of positive law — the stage on which it plays its beneficent rôle of civil order; the sovereign is the commander of positive law; and the government is the formulator and administrator of positive law.

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[1] Congressional Government, p. 37 (written in 1884).